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**Ravalli County Commissioners**

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December 5, 2008

Ravalli County Commissioners  
Ravalli County Administrative Center  
Hamilton, MT 59840

RE: Email Complaint against Streamside Setback Committee dated September 24, 2008

Dear Commissioners:

I have received your forward of the email complaint dated September 24, 2008, from Kristie and Eugene Kosaka. You submitted this complaint to my office to determine whether any violations of Montana's open meeting laws have occurred by the Streamside Setback Committee (SSC) which was formed by the Commissioners in April of 2007. My office has reviewed the entire SSC email correspondence file, Ms. Kosaka's forwarded email, and a similar complaint sent to the Attorney General's office by Terrilyn Daniel. Additionally it has been necessary to interview Planning Department staff to understand as best as could be determined the operation of the SCC to date. After review of these materials, I conclude as follows:

Montana's open meeting laws are guaranteed by Article II, Section 9, of the Montana Constitution, which is to be liberally interpreted in favor of openness. Assoc. Press v. Crofts, 2004 MT 120, 321 Mont. 193, 89 P.3d 971. These laws apply to advisory committees organized for a public purpose. Id. Any decision made in violation of open meeting procedures may be declared void if the violation denies the public the right to know and participate before final agency action is taken. *See, e.g.*, §2-3-213, MCA; Bd. of Trustees v. Bd. of County Commr's (1980), 186 Mont. 148, 606 P.2d 1069.

In Montana, a public "meeting" occurs when a quorum of the constituent membership of any public board convenes, whether in person or by means of electronic equipment, to hear, discuss, or act upon a matter. §2-3-202, MCA. Public meetings must be open to the public, and may only be closed to discuss matters relating to individual privacy (unless those privacy rights are waived) or litigation strategy. §2-3-203, MCA. Any appointed committee or subcommittee is subject to open meeting requirements. §2-3-203(6), MCA. Any meeting as defined above that is of significant interest to the public must be properly noticed for public participation before final action is taken. §2-3-103, MCA.

Under Montana law and Ravalli County Resolution 3000 (establishing the Ravalli County Streamside Setback Committee in April of 2007), it is clear that the SSC is a public advisory board to which open meeting laws apply. Further, as a committee appointed by the Commissioners, the SSC is required to follow county procedures regarding public participation.<sup>1</sup> Ravalli County's public participation procedure is found in Ravalli County Resolution 1372. This resolution provides for a minimum of two days' posted notice prior to a public meeting before a decision is made or action is taken on any matter of significant public interest. This resolution further provides that all meetings are open to the public unless closed as provided by statute.

After consultation with the Planning Department, it is my understanding that the SSC generally operated according to the above laws and procedures. Specifically, a minimum of two business days' public notice was posted by the Planning Department for any public meeting where a quorum of SSC members would be present.<sup>2</sup> This posting included an agenda for each meeting. Additionally, SSC members were informed by Planning Department staff that even subcommittee meetings (where a quorum of the SSC would not be present) remain open to the public under County policy. These procedures generally meet the requirements of Montana law and County resolution.

In regard to non-quorum subcommittee meetings, the Planning Department is generally not informed about these meetings unless a Planning staff member is asked to attend. Notice of subcommittee meetings, when Planning Department staff will be attending, is placed on the Planning Department's internal calendar and is available to the public upon request. It is my opinion that while this process meets the requirements of Montana law and County procedure, it does not provide the "thoroughly transparent and participatory process" anticipated when the SSC was established. See Resolution 3000, p. 3. However, it is important to note that, under Montana law, any subcommittee meeting of less than a quorum of the SSC cannot take official action. Therefore, any drafts reviewed or proposed by a subcommittee would necessarily have to be reviewed at properly noticed SSC meetings where a full quorum was present. As a matter of course, this process would mitigate any violations by a subcommittee and ensure the notice and public participation requirements mandated by Montana law.

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<sup>1</sup> One of the SSC's stated roles was to adopt a public involvement plan to describe how the public will be informed of SSC activities. Resolution 3000, p. 4. That Project Plan was drafted but to date has not been officially adopted by the SSC. In the absence of a more specific plan, the general provisions of Ravalli County Resolution 1372 have been applied.

<sup>2</sup> There is some conflict between Resolution 3000 and "Exhibit A" regarding what constitutes a quorum for the SSC. "Exhibit A" specified that seven members would constitute a quorum based on the initial proposal to have a 13-member committee. However, Resolution 3000 established the SSC with 17 voting members. Therefore, under §7-1-201(11), MCA, a majority of the SSC members (9) constitutes a quorum. All documents are in agreement with Montana law that official action may only be taken by the SSC by a majority vote of members present and voting at a meeting at which a quorum is present.

Given the above information and my review of the materials provided, it appears that an un-noticed electronic mail discussion among a quorum of the SSC did occur in July of 2008, regarding whether subcommittee meetings with less than a quorum of SSC members present needed to be open to the public. Although the issue of how electronic mail communications fit in with open meeting process is a relatively new one in Montana, it is my opinion that the electronic discussion held in July by the SSC should be considered a public meeting (*i.e.* a convening of a quorum by means of electronic equipment to discuss a matter over which the agency has advisory power).<sup>3</sup> That being the case, the SSC should have posted notice under the procedures established by Ravalli County before having this discussion. Bd. of Trustees, 186 Mont. at 155, 606 P.2d at 1073.

Although Montana's open meeting laws would not require notice for ministerial or administrative functions (such as scheduling of meetings) or staff reports regarding fact gathering efforts, it is clear that the July electronic mail exchange contained discussion and deliberation which should have been open to public scrutiny. Crofts, ¶22. Because this discussion was conducted in violation of open meeting laws, I would recommend that the County Commissioners void any decision or action taken as a result of that discussion.

With that being said, my review of the file does not reveal whether any official action was in fact taken by the SSC based on the un-noticed discussion. To the knowledge of Ravalli County Planning Department staff, no subcommittee meetings were closed to public attendance and no meetings of a quorum of the SSC were held without posted notice. However, I would recommend that the Commissioners meet with the SSC to determine whether any SSC or subcommittee meetings after the July electronic mail discussions were actually held without proper public notice or without allowing public attendance. If such violations are confirmed, Montana law requires that any subsequent actions taken be voided. *See, e.g., Bryan v. Yellowstone Co. Elementary*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381. Even if no further violation of Montana open meeting laws is found, I would still recommend the Commissioners admonish individual members of the SSC that all committees must follow established county procedure. Members should be informed that failure to follow these procedures could constitute removal from the SSC for cause.

I understand that as of the date of this opinion the Commissioners are moving toward dissolution of the SSC and do not anticipate using the draft regulations the SSC produced; therefore, my above recommendations may be moot. Nevertheless, since it must be the County's intent to keep all meetings (even those for which posted notice and public comment is not required) open and transparent to the public, a review of these procedures is still helpful.

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<sup>3</sup> Under Montana law, "discussions" in the context of open meetings connotes collective discussion and collective acquisition of information among the constituent membership of the public body. *See, e.g.,* 42 Mont. A.G. No. 51 (1988). Under this definition, the July electronic mail exchange to all voting SSC members appears to be a discussion to which open meeting laws apply.

In giving this opinion, I am mindful of the fact that members of the public voluntarily serve on appointed committees and boards and are at best only generally informed as to the constitutional requirements of public notice and participation when assuming duty. However, there is no question that open meeting laws and procedures must be adhered to. Further, there is also no question it is the Commissioners' responsibility to ensure laws are followed or to take appropriate steps when it does not. As I cautioned the Board of Commissioners in February 2007 in regard to the creation of the SCC, the appointment of boards and committees requires continued supervision and is not always the best way to bring issues before the Commissioners. As already discussed, creation of a board means that proper staffing, training, and monitoring is necessary to address violations of any laws or county procedures by citizen volunteers, whether unwitting or not.

Finally, I note that my review of the complaints and files in the matter reveal no violation of public records laws, as all electronic documents and mail, to my knowledge, have been properly kept by the Planning Department staff coordinator for the SSC, and have been provided to the public upon request.

If you have any questions or concerns, or additional information you would like me to consider, please let me know.

Sincerely,



George H. Corn

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cc: Ravalli County Commissioners  
John Lavey, Planning Department  
Chris Tweeten, Attorney General's Office